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Supreme Court, U.S.
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No. 01-46

IN THE

Supreme Court of the United States

FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF OF THE FEDERAL MARITIME COMMISSION

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REPLY BRIEF OF THE FEDERAL MARITIME COMMISSION

At issue in this case is the constitutionality of the private complaint procedure established by Congress in the Shipping Act of 1984. The 1984 Act has as its guiding purpose the creation of "a nondiscriminatory regulatory process" to develop "an efficient and economic transportation system" and to meet "national security needs." 46 U.S.C. app. 1701(1-4) (declaration of policy). As the agency responsible for administering the Act, the Federal Maritime Commission believes the issue whether port facilities run by states are immune from certain statutory processes is of great significance, and accordingly is asking this Court to review the Fourth Circuit's decision that the doctrine of state sovereign immunity applies to proceedings before the agency. *Amici curiae* the National Association of Waterfront Employers (an association of private marine terminal operators that compete with state-run ports), the United States Maritime Alliance (an association of vessel-operating common carriers, stevedores, and others), and the Carriers' Container Council (an association of United States and foreign vessel-operating common carriers), the voices of private industry in this case, agree that the court of appeals' decision is so deleterious to the maritime sector that it merits this Court's review. The South Carolina State Ports Authority (SCSPA), the beneficiary of the court of appeals' decision, naturally seeks to protect that decision by opposing the Commission's petition. The United States of America, the Commission's co-respondent before the court of appeals, agrees with the Commission that the decision below is wrong, but opposes review.[1] We turn first to the arguments of the United States.

[1] Disagreement between the Commission and the United States is not unusual. See, *e.g.*, *United States v. Federal Maritime Comm'n*, 694 F.2d 793, 804 (D.C. Cir. 1982) ("Congress was aware that the Justice Department on occasion had been and would be adversary of the [Commission] — both as a co-respondent and as a petitioner — and yet evinced no intent to preclude the Department from assuming that role").

I. The United States Fails to Acknowledge That the Court of Appeals' Holding That "Congress Cannot Authorize" Administrative Adjudications Involving State-run Ports Constitutes Invalidation of the Statute Requiring Such Proceedings

The United States maintains that "the decision below was incorrect," US Br. in Opp. 18, but contends that this Court should not review the court of appeals' erroneous ruling for three reasons. First, the United States suggests that the court of appeals did not "unambiguously" hold the private complaint provisions of the 1984 Act unconstitutional. *Id.* at 19. However, the United States also declares that

> if the court of appeals had understood the Shipping Act to *require* the FMC to conduct formal adjudicative proceedings whenever private complaints are filed against state entities, its holding that the Constitution bars such proceedings would amount to a determination that an Act of Congress is unconstitutional.

Id. at 18-19 (original emphasis). We submit that this is precisely what the court of appeals held. The court ruled that "[h]ere, a private party filed a complaint against an unconsenting State. The FMC had no choice but to adjudicate this dispute." Pet. App. 20a. The court of appeals also found that "the Commission *must* hear all complaints filed with it." Pet. App. 17a (original emphasis). See also 46 U.S.C. app. 1710(b) (the Commission "shall" adjudicate all filed complaints); 46 U.S.C. app. 1710(g) ("For any complaint filed within 3 years * * * the Commission shall * * * direct payment of reparations to the complainant for actual injury").

Contrary to the assertions of the United States, the court of appeals did not hold that "constitutional principles of state sovereign immunity preclude *the FMC and its ALJs* from adjudicating private complaints against unconsenting state entities." US Br. in Opp. 18 (emphasis supplied).

Rather, it ruled that "*Congress cannot authorize* private parties to haul unconsenting states before the adjudicative apparatus of federal agencies and commissions." Pet. App. 25a (emphasis supplied). It asked whether "the founders [would] have countenanced a system by which *Congress* could have avoided all the strictures of sovereign immunity by creating different tribunals where state sovereign immunity was completely inapplicable[.]" Pet. App. 12a-13a (emphasis supplied). It suggested that "dual sovereignty posits a relationship of mutual respect between Congress and the states," and found that "it is not consistent with that relationship for *Congress* to subject an unconsenting state to the coercive club of private actions regardless of the forum." Pet. App. 13a (emphasis supplied).

It is evident that the court of appeals held unconstitutional an Act of Congress, not the Commission's administration of that Act. If the court had thought that the Commission had implemented the 1984 Act in an impermissible way, it would have set forth such a conclusion as the basis of its decision, as the district courts have done in three of the four recent cases cited by the United States. US Br. in Opp. 12 n.4 (citing *State of Ohio EPA v. United States*, 121 F.Supp.2d 1155, 1168 (S.D. Ohio 2000) (issuing "a declaratory judgment that the regulations set forth in 29 C.F.R. Part 24 relating to claims made by individual complainants against the various States" violate the Eleventh Amendment); *Florida v. United States*, 133 F.Supp.2d 1280, 1291 (N.D. Fla. 2001) ("The administrative process here at issue * * * was adopted not by Congress in the statute but by the Secretary of Labor in the implementing regulations"); and *Rhode Island v. United States*, 115 F.Supp.2d 269, 271 (D. R.I. 2000) ("The regulations permit the employee to file a complaint with [OSHA], an agency within [the Dep't of Labor]")). Unlike these district court decisions, relied upon by the United States for its argument that the question presented by this case would be better presented in a later case, the court of

appeals in this proceeding clearly concluded that sections of an Act of Congress failed to pass constitutional muster.

Second, the United States observes that this case constitutes the first time a court of appeals has addressed the application of sovereign immunity to an administrative adjudication subsequent to this Court's decision in *Alden v. Maine*, 527 U.S. 706 (1999) (state sovereign immunity bars private suits to enforce a federal statute in state court). Significantly, the United States asserts that *Alden*'s reasoning, to the extent it "rested on the impropriety of commandeering a State's own courts * * * over the State's objection," is inapplicable to this case, and further avers that *Alden* does not "address the question whether constitutional immunity principles apply to proceedings that * * * are conducted in an administrative rather than judicial forum." US Br. in Opp. 13. Nevertheless, the United States suggests that "the constitutional issue presented in this case would benefit from further consideration in additional statutory contexts" in cases "now pending in other courts of appeals." *Id.* at 20. However, as noted above, the district courts in those pending cases appear to have addressed the constitutionality of the regulations rather than the underlying statutes. Moreover, none of the pending cases cited by the United States involves maritime commerce. *Id.* at 12 n.4 (cited cases involve "whistle blower" laws). One crucial premise of the Commission's petition is that maritime commerce merits special consideration given its significance in the genesis of the Constitution. Pet. 16-18. Cases that do not involve maritime commerce will not present the Court with the maritime component of the issue central to this proceeding.

Finally, the United States asserts that there would be little practical effect if the court of appeals' decision is permitted to stand. US Br. in Opp. 20-22. It is important to understand the basis for this view. The United States argues that a proceeding to enforce a Commission-issued reparations award (one form of relief sought in Maritime Services' complaint against SCSPA) would be forbidden, although the

1984 Act specifically provides for such an enforcement proceeding. *Id.* at 21. See 46 U.S.C. app. 1713(d) (enforcement of reparations awards). No court has ever ruled that an enforcement proceeding under the 1984 Act is forbidden; the Commission itself stated that such a proceeding would not be barred because it constitutes a form of judicial review, not a lawsuit. Pet. App. 36a-37a. Thus, the United States' dismissive approach to this case is premised on its unique interpretation of the 1984 Act, an interpretation that holds invalid a provision of the Act no court has ever found constitutionally infirm. In contrast, the Commission and the *amici curiae* believe the precedent established by the court of appeals' decision will have significant negative consequences for the maritime industry. Indeed, the United States' declaration that there is "no evidence that private claims of Shipping Act violations committed by state entities have been filed with any frequency," US Br. in Opp. 21, is repudiated by the cases cited in the *amici curiae* brief of USMX and CCC. See USMX and CCC Am. Br. 7 n.4.[2]

The United States' conclusion that the court of appeals' decision will have little effect on the maritime industry and the Commission's regulation of that industry is both perfunctory and erroneous. In contrast, the United States offers serious and reasoned arguments in support of its assertion that the court of appeals' decision is incorrect. See US Br. in Opp. 11-18. The United States agrees with the Commission's position that an administrative adjudication is not a "suit in law or equity," is not an exercise of judicial power, and therefore is not

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[2] The practical effect on Maritime Services' complaint will be great. Although the court of appeals opined that a complainant could seek a cease and desist order so long as it names a state official in its complaint, Pet. App. 21a–22a, the court did not remand this proceeding to the Commission to permit Maritime Services to amend its complaint in this manner. Rather, it ordered the entire complaint dismissed. Pet. App. 25a. The United States agrees that complaints naming a state official and seeking prospective relief should be permitted, but does not address the court's dismissal of the entirety of Maritime Services' complaint. US Br. in Opp. 20.

subject to the Eleventh Amendment and the doctrine of state sovereign immunity from suit. *Ibid.* These areas of agreement form much of the foundation of the Commission's petition for a writ of certiorari.

II. The Arguments of the South Carolina State Ports Authority Attempt to Divert Attention From the Significant Constitutional Issue Presented by This Case

The Commission will address each of SCSPA's six main arguments in turn. First, SCSPA asserts that this Court should deny the writ because the court of appeals "faithfully followed this Court's precedent." SCSPA Br. in Opp. 11. However, as there is no Supreme Court precedent addressing the issue whether state sovereign immunity from suit applies to an administrative adjudication, the court of appeals was not able to follow direct precedent. Rather, the court analogized to cases that addressed the scope of sovereign immunity before federal and state courts. Pet. App. 4a-9a. Whether this analogy is correct is precisely the issue in this proceeding.

Next, SCSPA argues that the Court should deny the writ because this case does not fall within the Commission's jurisdiction. SCSPA Br. in Opp. 12. SCSPA's present argument that the Court should deny the petition because the Commission has "failed to consider whether the Johnson Act forecloses its jurisdiction over this case" is disingenuous. SCSPA Br. in Opp. 13. Although raised in SCSPA's original motion to dismiss the complaint, the issue of the relationship between South Carolina's gambling statutes and the John[illegible] Act was not addressed by the administrative law judge. Pet. App. 49a.[3] In its order overruling the administrative law

[3] SCSPA's claim that the Johnson Act must trump the 1984 Act is mistaken. See, *e.g.*, *Federal Maritime Comm'n v. Pacific Maritime Ass'n*, 435 U.S. 40, 52-60 (1978) (lawfulness under the National Labor Relations Act does not preclude unlawfulness under the Shipping Act, 1916.

judge with respect to state sovereign immunity, the Commission remanded the proceeding for consideration of SCSPA's arguments regarding the Johnson Act. Pet. App. 37a. SCSPA both appealed the Commission's order to the court of appeals and filed a motion asking the administrative law judge to hold the remanded proceeding in abeyance pending the outcome of the court of appeals' review; SCSPA's motion was granted.[4] SCSPA did not raise the Johnson Act issue before the court of appeals.[5]

SCSPA also suggests that because this case does not involve "the common carriage of goods," it does not pertain to oceanborne commerce and is not subject to the Commission's jurisdiction. SCSPA Br. in Opp. 13. This is inaccurate, because the 1984 Act confers jurisdiction over "transportation by water of *passengers* or cargo between the United States and a foreign country for compensation." 46 U.S.C. app. 1702(6) (emphasis supplied). In its complaint, Maritime Services alleged that it intended to offer passenger cruises to nowhere and passenger cruises to the Bahamas, a foreign country, for compensation. See Pet. App. 40a.

Third, SCSPA attempts to insert the scope of the United States' sovereign immunity into this proceeding by referring to arguments made by the United States, in a different forum and under a different statute, that it is immune from some types of administrative action. SCSPA Br. in Opp. 14-16. The degree of the United States' immunity from proceedings in its own fora is irrelevant; the scope of SCSPA's immunity is

[4] The Commission has lodged with the Clerk of this Court ten copies of the administrative law judge's May 10, 2000 order granting SCSPA's request to hold the remanded proceeding in abeyance.

[5] In any event, the precedent established by the court of appeals' decision does not apply exclusively to cases involving cruise ships on which gambling may be offered. Rather, the decision states that Congress may not authorize federal administrative agencies to adjudicate complaints filed against state entities, irrespective of the subject matter of the authorizing statute. Pet. App. 25a.

the only issue in this case. SCSPA's suggestion that the wholly geographic definition of the term "United States" in the 1984 Act is germane to this proceeding is similarly misplaced. *Id.* at 15. It is the definition of "person," not "United States," that determines whether a port like SCSPA is subject to private complaints filed under the Act. See 46 U.S.C. app. 1702(14), Pet. App. 63a. This Court has already determined that a state-run port such as SCSPA is a "person." *California v. United States*, 320 U.S. 577 (1944). See also *Plaquemines Port v. Federal Maritime Comm'n*, 838 F.2d 536, 542 (D.C. Cir. 1988) ("prior interpretations of the 1916 Act's provisions have continuing precedential force" under the 1984 Act).

Fourth, in spite of its own recognition that "the issue of Congressional intent to abrogate * * * is not at issue here," SCSPA argues that because no provision in the 1984 Act purports to abrogate sovereign immunity, the court of appeals could not have held any portion of the Act unconstitutional. SCSPA Br. in Opp. 22, 16-18. The issue of abrogation has never been relevant to this proceeding, as the court of appeals recognized. Pet. App. 21a. See US Br. in Opp. 10 n.3 ("Neither the United States nor the FMC had contested" whether the 1984 Act abrogates state immunity under the Fourteenth Amendment). See also *supra* at 2-4 (explaining that the court of appeals held an Act of Congress unconstitutional).

Fifth, SCSPA asserts that the federal interest in the uniform regulation of maritime commerce is not sufficient to override the immunity SCSPA claims it should enjoy. SCSPA Br. in Opp. 18-20. However, the case SCSPA cites for this proposition, *In re New York*, 256 U.S. 490 (1921), is an *admiralty* case. Federal judicial jurisdiction over a common law admiralty claim is not fungible with Congress' Article I power over international maritime commerce or Executive Branch authority to regulate such commerce. See, *e.g.*, Frank L. Maraist, *Admiralty* 1 (West 1988) (admiralty "denotes those rules which govern contract, tort and

worker's compensation claims arising out of commerce on or over water"). See also *United States v. Locke*, 529 U.S. 89, 99 (2000) (explaining that exclusive federal control over maritime commerce was one of the reasons the Founders gave for adopting the Constitution). The court of appeals apparently shared this understanding: SCSPA cited *In re New York* in its reply brief, but the court did not rely on that case in its decision.

Finally, SCSPA contends that the court of appeals' decision did not create a conflict in principle among the circuits. SCSPA Br. in Opp. 21-29. Relying upon the same four federal district court opinions cited by the United States (without noting that the United States has appealed three of the four cases (US Br. in Opp. 12 n.4)), SCSPA extrapolates from these four opinions a "universal understanding among the lower federal courts" regarding the application of sovereign immunity to administrative tribunals. *Id.* at 21. The Commission demonstrated above that these district court cases, which address the regulations implementing several "whistleblower" statutes, do not apply to the question presented by this proceeding. See *supra* at 3-4.

The remainder of SCSPA's arguments regarding the conflict in principle appear to misapprehend the Commission's position. In the cases cited by the Commission, several federal courts of appeals refused to apply the Eleventh Amendment to proceedings before federal administrative tribunals. Pet. 18-21. Although many of the opinions also addressed concepts like waiver or abrogation of immunity, these concepts do not form the bases for the courts' holdings. Rather, the opinions share the fundamental conclusion that the Eleventh Amendment does not apply to entities (like the Commission) that do not exercise judicial power. This is the conflict in principle the Commission has sought to illustrate. See US Br. in Opp. 11-12 (accord with the Commission's description of the relevant cases).

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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